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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DONALD GENE PHILLIPS,

Plaintiff and Appellant,

v.

SOLOMON MORRIS DAVIS et. al.,

Defendants and Respondents.

B215288

(Los Angeles County
Super. Ct. No. BC402281)

APPEAL from a judgment of the Superior Court of Los Angeles County,

Ann I. Jones, Judge. Affirmed.

Donald Gene Phillips, in pro. per., for Plaintiff and Appellant.

Law Offices of Bennett A. Rheingold and Bennett A. Rheingold for Defendants
and Respondents.

Two prison inmates allegedly formed a contract for the provision of legal services in exchange for compensation. The inmate who allegedly sought the legal services, defendant and respondent Solomon Davis, allegedly represented to plaintiff and appellant Donald Phillips that he was an attorney and that this contract for legal services would not violate California Code of Regulations, title 15, section 3163 (hereafter “section 3163”). Section 3163 authorizes inmates to provide legal services for other inmates but prohibits them from receiving compensation from the inmates assisted, so Davis allegedly arranged to have his wife, defendant and respondent Dr. Judy Hunter-Davis, pay Phillips. After defendants refused to pay Phillips, he sued for breach of contract and fraud. The superior court sustained a demurrer without leave to amend on the basis that section 3163 prohibited Phillips from being compensated for providing the legal services. Phillips appeals from a judgment of dismissal, contending that the trial court erred by sustaining the demurrer and denying him leave to amend. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of all relevant events, Phillips and Davis were both incarcerated inmates in the California State Department of Corrections facility located in San Luis Obispo. During the period of August 2007 to August 2008, Phillips allegedly provided Davis with legal services¹ pursuant to an oral contract under which Phillips would

¹ Phillips allegedly assisted Davis with his criminal appeal and petition for habeas corpus, even though he is not a licensed attorney.

receive compensation.² Phillips further alleged that Davis represented himself as an attorney³ and told him that this contract did not violate section 3163 because his wife would provide Phillips with the compensation.

Phillips brought this suit against defendants on November 18, 2008, after they failed to deliver the compensation. The complaint set forth two causes of action: breach of contract and fraud. The breach of contract cause of action is based on the alleged oral contract, and the fraud cause of action is based on Davis's alleged representations that he was an attorney and that the contract was legal. Both actions seek \$50,000 in damages.

On December 17, 2008, Phillips attempted to amend his complaint to state an additional tort cause of action, "extortion," based on an alleged threat by Davis. Phillips alleged that, in October 2008, Davis told him that "it would be cheaper to have Plaintiff[] stabbed and physically assaulted" than to pay the compensation under the oral contract. Davis also allegedly stated that Phillips should expect such an assault unless he surrendered his legal work. Phillips stated that he did not report these alleged threats to prison authorities. Phillips's amended complaint with the extortion cause of action was rejected by the court because it was not in compliance with the California Rules of Court, the Code of Civil Procedure, or the Los Angeles Superior Court Rules, but the

² The compensation allegedly included \$25,000 and packages while in prison to make his stay more comfortable. After his release, he was allegedly to receive various other articles and payments.

³ Davis is not and has never been a licensed attorney in California.

court ordered Phillips to submit an amended complaint in compliance with those rules by January 23, 2009. Phillips chose not to file an amended complaint.⁴

Defendants filed a demurrer to the complaint on January 27, 2009, arguing that Phillips had sufficiently pleaded neither a breach of contract nor a fraud cause of action because section 3163 prohibits prison inmates from receiving compensation for providing legal services to other inmates. Phillips's opposition to the demurrer argued that section 3163 does not prohibit *third parties* from compensating inmates for providing legal services to other inmates. After holding a hearing on the demurrer on March 23, 2009,⁵ the court sustained the demurrer in its entirety without leave to amend. Phillips filed a timely notice of appeal.

⁴ Phillips instead filed a motion for default judgment. This motion was denied by the superior court because it was filed two days after the demurrer was filed. On appeal, Phillips contends that this was error. However, the bald assertion that the motion for default judgment should have been granted is inadequate, as “[c]ontentions supported neither by argument nor by citation of authority are deemed to be without foundation and to have been abandoned.” (*Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021.) We also note that this ruling was within the superior court's discretion, even if the deadline for responsive pleading had passed, because the demurrer was filed two days before the motion for default judgment. (*Reher v. Reed* (1913) 166 Cal. 525, 528 [holding that default judgment is inappropriate when untimely answer is filed before motion for default judgment]; *Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 141; *Bank of Haywards v. Kenyon* (1917) 32 Cal.App. 635, 636-637 [holding that trial court abused its discretion both in striking untimely answer that was filed before motion for default judgment and granting motion for default judgment].)

⁵ The hearing transcript was not included in the appellate record, so all necessary inferences are made in favor of the judgment. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

CONTENTIONS ON APPEAL

On appeal,⁶ Phillips contends that the superior court erred by sustaining the demurrer and denying leave to amend the complaint. First, Phillips contends that the complaint states a valid breach of contract cause of action because section 3163 does not prohibit third parties from compensating inmates for rendering legal services to other inmates. Second, he contends that, even if section 3163 prohibits such compensation, he relied on Davis's alleged fraud in representing that he was an attorney and that the section 3163 does not prohibit compensation from third parties. Finally, Phillips argues that he could amend his complaint to assert other causes of action, including plagiarism, copyright infringement, "extortion," and conversion. In response, defendants rely on the arguments advanced before the trial court. They also argue that the appeal should be dismissed because appellant's brief is fatally inadequate.

DISCUSSION

1. Standard of Review

On appeal from a judgment of dismissal following a demurrer that is sustained without leave to amend, we assume the truth of all facts properly pled in the complaint and may consider facts subject to judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer has been sustained, we must determine if "the complaint states facts sufficient to constitute a cause of action." (*Ibid.*) When leave to amend has been denied, we must determine if there is a "reasonable possibility" that amendment

⁶ Phillips acted in pro. per. before the trial court and in this appeal.

can cure the defect—if there is, we reverse because the trial court has abused its discretion, and if not, we affirm because the trial court has not abused its discretion. (*Ibid.*) “The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Ibid.*) The plaintiff need not have shown such reasonable possibility before the trial court, but must make this showing on appeal. (*William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.)

2. *The Demurrer Was Properly Sustained*

The complaint stated neither a cause of action for breach of contract nor a cause of action for fraud because the alleged contract was illegal. As we now explain, while the fraud cause of action is facially distinct from the breach of contract cause of action, Phillips is simply trying to recover what he allegedly is due under the illegal contract. Therefore, the demurrer was properly sustained.

a. *The Breach of Contract Cause of Action Is Prohibited Because the Alleged Contract is Unlawful*

Phillips contends that he pled a cause of action for breach of contract because he formed a lawful contract to provide Davis with legal services for compensation. We disagree.

The general rule is that contracts based upon an unlawful purpose will not be enforced. (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 150.) When the entire basis of the contract is unlawful, it is void under Civil Code section 1598, which states that “[w]here a contract has but a single object, and such object is unlawful, . . . the entire contract is void.” We must interpret section 3163 to determine

if Phillips’s contract to provide legal services for compensation was lawful.

Section 3163 states that “[o]ne inmate may assist another in the preparation of legal documents, but shall not receive any form of compensation *from the inmate assisted.*” (Italics added.) The plain language of the regulation prohibits Phillips from recovering payment from Davis. However, Phillips contends that he can recover from Hunter-Davis because she is a third party.⁷ While a strictly formalist interpretation of section 3163 might allow such a result, a commonsense interpretation prohibits the inmate providing legal services from receiving compensation from anyone. When we interpret a regulation, a question of law, we try to determine the administrative agency’s intent while giving the regulation’s “words their plain, commonsense meaning.”

(*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919 [citing *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-633]; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898.) However, since both interpretations of section 3163 are technically plausible, we also consider the administrative agency’s intent. (*Kavanaugh v. West Sonoma County Union High School Dist.*, *supra*, 29 Cal.4th at p. 919; *Guzman v. County of Monterey*, *supra*, 46 Cal.4th at p. 898; see *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234–1235 [same rules of statutory construction govern interpretation of regulations by

⁷ We also note that both Davis and Hunter-Davis would be liable for the alleged debt under the community property laws of this State. (Fam. Code, § 910 [“the community estate is liable for a debt incurred by either spouse before or during marriage[.]”]; *Lezine v. Security Pacific Fin. Services, Inc.* (1996) 14 Cal.4th 56, 64 [community property is liable for “debts incurred by one spouse alone exclusively for his or her own personal benefit”].) Thus, it is difficult to conceive how the debt could be Hunter-Davis’s alone.

administrative agencies].)

Section 3163 was promulgated to create a limited exception to Business and Professions Code section 6125, which states that “[n]o person shall practice law in California unless the person is an active member of the State Bar.” The practice of law has been interpreted to include the provision of legal advice and preparation of legal instruments. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127-128 [citing *People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535] (*Birbrower*).) Further, this statute prohibits compensation for any person who is not a licensed California attorney when the legal services are provided. (*Longval v. Workers’ Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 803 (*Longval*); *Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 Cal.App.2d 572, 576 (*Hardy*).) Compensation prohibitions created by other statutes or regulations are “superfluous” and unnecessary—no one who is not a licensed California attorney can be compensated for providing legal services without an exception. (See *Longval, supra*, 51 Cal.App.4th at p. 803; *Hardy, supra*, 99 Cal.App.2d at p. 576.) People providing legal services must be licensed to ensure that they do so competently, except when competing policy concerns justify an exception. (*Birbrower, supra*, 17 Cal.4th at pp. 127-128, 130 [stating that such exceptions “are narrowly drawn and strictly interpreted”].)

The underlying policy of the section 3163 exception flows from the need to protect inmate ability to pursue habeas corpus relief. (*Johnson v. Avery* (1969) 393 U.S. 483 (*Johnson*).) In *Johnson*, which section 3163 cites as a reference in the “AUTHORITY” section accompanying the regulatory text, the Supreme Court struck

down a Tennessee prison regulation that prohibited inmates from assisting each other with legal affairs. (*Id.* at p. 484.) While the Court recognized that prison authorities need to be able to administer state detention facilities in an orderly manner that ensures security and discipline, it emphasized the fundamental importance of the writ of habeas corpus and the need to maintain the right unimpaired. (*Id.* at p. 485.) Therefore, a prison regulation that impairs the ability of prisoners to pursue habeas relief, as the Tennessee regulation did by essentially denying the writ to illiterate or poorly educated prisoners, is invalid (absent adequate alternative protections). (*Id.* at pp. 485-490). Because *Johnson* was decided before section 3163, was referenced by section 3163, and mandated that prisoners be allowed to provide legal services for each other, it is reasonable to presume that the regulation was promulgated to comply with the Supreme Court's mandate. Viewed in this light, Phillips's interpretation of section 3163 as allowing third parties to compensate inmates is unwarranted by section 3163's underlying policy and creates too great an exception to Business and Professions Code section 6125.

Section 3163's limited exception only applies to the extent necessary to allow it to operate effectively, as it conflicts with the express prohibition and underlying policy of Business and Professions Code section 6125. (See *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663; *People v. Garcia* (1999) 21 Cal.4th 1, 6.) The policy underlying section 3163 does not support allowing unlicensed inmates to practice law for compensation in contravention of Business and Professions Code section 6125. (See *Birbrower, supra*, 17 Cal.4th at

pp. 127-128, 130). Rather, section 3163 was promulgated to allow prison inmates to provide free legal services for each other to facilitate access to the courts. Section 3163 was not carefully tailored to discriminate between parties that can and cannot pay inmates for legal services—it simply stated a prohibition on compensation to make clear that it was not promulgated to depart from the general rule that only licensed attorneys can be compensated for providing legal services. We therefore adopt the commonsense and intended interpretation that section 3163 prohibits inmates providing legal services from receiving compensation from any party. Therefore, Phillips has not pled and could not plead a cause of action for breach of contract.

b. Fraud Does Not Make an Unlawful Contract Enforceable

Phillips also contends that he pled a cause of action for fraud because, in the course of offering Phillips the contract for legal services, Davis allegedly represented that he was an attorney and that the contract was lawful. We disagree.

Phillips's cause of action for fraud is meritless because it is an attempt to recover payment for the legal services that he allegedly provided Davis under the illegal contract. He is simply arguing that he was told the contract was legal and that he should therefore be able to recover his expected compensation. This is analogous to cases in which parties have tried to use estoppel to prevent the other party from raising the defense of illegality. In those cases, the courts have held that a party cannot be estopped from raising the illegality defense. (E.g., *Prime v. Hyne* (1968) 260 Cal.App.2d 397, 402-403.) Even if there has been reliance on the words or actions of the other party, allowing estoppel would essentially enforce terms of the illegal contract, which courts

cannot do. (*Ibid.*) Here, allowing Phillips to proceed under the fraud cause of action would be providing him with a way to enforce the terms of the illegal contract, since he is trying to obtain the same compensation as under the breach of contract cause of action on the basis that he relied on Davis's representations, and this we cannot do.

Further, relief has been denied in analogous situations involving unlicensed professional practice. (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 992 (*Hydrotech*).) In *Hydrotech*, the plaintiff was an unlicensed subcontractor that relied on the defendant general contractor's assurances that it would receive payment for work notwithstanding the absence of a license. (*Ibid.*) The defendant promised to place the plaintiff with a licensed contractor on all aspects requiring a license and repeatedly assured the plaintiff that it would be paid. (*Ibid.*) The contract to perform the construction work was illegal because the subcontractor was unlicensed (Business and Professions Code section 7031), and the court prohibited the plaintiff from proceeding under either a contract or fraud cause of action. (*Hydrotech, supra*, 52 Cal.3d at pp. 997-1002.) The court reasoned that allowing the fraud cause of action to proceed would undermine the statute prohibiting the unlicensed contractor from providing or being paid for construction services because the contractor would still be recovering the value of the services rendered. (*Ibid.*) The same rationale applies here. Phillips seeks to recover payment for rendering legal services under the fraud cause of action. Allowing him to recover the value of these services would undermine the Business and Professions Code section 6125 prohibition of compensation for the unlicensed practice of law. "Knowing that they will receive no help from the courts and

must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place.” (*Lewis & Queen v. N. M. Ball Sons, supra*, 48 Cal.2d at p. 150.) Therefore, Phillips has neither pled nor could plead a cause of action for fraud.

3. *Leave to Amend Was Properly Denied*

Finally, Phillips argues that he could amend his complaint to assert other causes of action.⁸ We disagree. First, while Phillips has not alleged that his legal documents were copyrighted, he contends that he could state a copyright cause of action. However, federal courts have exclusive jurisdiction over copyright cases (28 U.S.C. § 1338), so we cannot address this cause of action.

Second, Phillips contends that he could state a cause of action for plagiarism. However, any state law cause of action for plagiarism of Phillips's written documents is preempted by federal law because the alleged copying is precisely what the copyright laws protect against. (17 U.S.C. § 102 et seq.; *Klekas v. EMI Films* (1984) 150 Cal.App.3d 1102, 1109-1111.) Thus, he cannot plead a cause of action for plagiarism.

Third, Phillips contends that he could state an “extortion” cause of action. This cause of action is generally referred to as duress in California. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 203-204.) However, a cause of action cannot be established when the party claiming duress had reasonably available alternatives to submitting to

⁸ Any causes of action or contentions that Phillips attempted to raise that are not addressed are rejected because they were not properly made and could not be discerned from his brief. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

the duress.⁹ (*Ibid.*) Here, Phillips admitted that he did not report Davis’s alleged threat to prison authorities. While we are not insensitive to the potential dangers of reporting misconduct of other prisoners, we nonetheless consider this a reasonable method of addressing the alleged threat that precludes a cause of action for duress.

Fourth, Phillips contends that he could state a conversion cause of action. “Conversion is generally described as the wrongful exercise of dominion over the personal property of another.” (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119 (*Fremont*)). “ ‘The elements of a conversion cause of action are (1) plaintiffs’ ownership or right to possession of the property at the time of the conversion; (2) defendants’ conversion by a wrongful act or disposition of plaintiffs’ property rights; and (3) damages.’ ” (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598 [quoting *Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 410].) (*Italics omitted.*) Here, Phillips cannot establish conversion. He stated that Davis made copies of his legal documents, not that Davis took the papers physically and refused to return them. Making or receiving copies of documents does not usually give rise to a cause of action for conversion. (*FMC Corp. v. Capital Cities/ABC, Inc.* (1990) 915 F.2d 300, 303-304 [construing California law].) “The reason for this rule is that the possession of copies of documents—as opposed to the documents themselves—does not amount to an interference with the owner’s property

⁹ Phillips has not indicated in the record whether he submitted to the duress and provided Davis with any documents. Phillips has alleged that Davis copied his legal documents before the alleged threat, so it is also unclear from Phillips’s allegations whether, at the time of the threat, there were any documents that Davis did not already have.

sufficient to constitute conversion. [Citation.] In cases where the alleged converter has only a copy of the owner's property and the owner still possesses the property itself, the owner is in no way being deprived of the use of his property. The only rub is that someone else is using it as well." (*Ibid.*) Thus, he cannot plead a cause of action for conversion.

4. *Appellant's Opening Brief Is Fatally Inadequate*

While we have addressed Phillips's contentions on their merits, we also note that his briefs are so inadequate as to justify rejecting his contentions. While Phillips was given relief from some of the procedural brief requirements, such as having the appropriate covers, including the certificate of word count, and submitting a sufficient number of copies, he was not given relief from submitting a brief that is legal in nature. The opening brief lacks substantive requirements that have not been waived—references to the record and almost any citations to legal authority. (Cal. Rules of Court, rule 8.204(a)(1)(B), (C).) The opening brief also lacks an explanation of why the judgment below is appealable and "a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(a)(2)(B), (C).) Therefore, we also reject his arguments on the basis that the brief was inadequate and devoid of legal argument, forfeiting the contentions and causes of action within. (*People v. Turner*, *supra*, 8 Cal.4th at p. 214, fn. 19; *Loranger v. Jones* (2010) 184 Cal.App.4th 847, 858, fn. 9; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4; *Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873-874.)

DISPOSITION

The judgment of dismissal is affirmed. Solomon Davis and Dr. Judy Hunter-Davis shall recover their costs on appeal.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.